



Resolution Institute

Review of security of payment
to subcontractors

*Response to request from
meeting on 17 August 2018*

24 August, 2018

Contents

Preamble	3
More about Resolution Institute.....	4
Summary of proposed changes.....	5
Conclusion.....	8

Preamble

Resolution Institute is pleased to submit this response to the as requested at the meeting with Resolution Institute's WA Chapter representatives on 17 August 2018 with Mr Fiocco, Mr Swinbourne and the Secretariat staff.

Resolution Institute is the largest body in the southern hemisphere representing the profession of non-litigious dispute resolution. It is the sole member of Institute of Arbitrators and Mediators Australia ("IAMA") and acts on its behalf to administer all its tasks as an appointor.

Resolution Institute is currently in discussions with Building Commission to amend the name of the appointor from IAMA to Resolution Institute. Prior to that amendment the name Resolution Institute used below should be read as IAMA where necessary.

Resolution Institute supports a nationally consistent legislative model. Resolution Institute considers that a single consistent and simple-to-understand model throughout Australia will be most effective in ensuring prompt payment of progress claims and preserving cash flow within the building and construction industry. Becoming familiar with a single model may support claimants and respondents in being able to use different state and territory laws more cost-effectively. It harmonises the training, accreditation and regulation of adjudicators. A nationally consistent model reduces costs to appointors, and in turn to the building and construction industry overall, as appointors will be able to apply consistent systems and processes for implementing and reporting on their appointing responsibilities.

Resolution Institute accepts that to achieve such a model and to have an effective set of security of payment laws will require the relevant Australian Government, state and territory Ministers to work together. Resolution Institute will be very willing to provide input to help resolve any contentious issues hindering an outcome that will be effective in benefitting the building and construction industry throughout Australia.

Members of the Resolution Institute Western Australia chapter are collectively of the opinion that the Murray model should not be the nationally consistent legislative model adopted.

The following responses to the Murray reform questions represent the collective opinion of the WA chapter. Given the diverse views of the membership across all states, the views should be taken as those of the WA Chapter only and not the position of Resolution Institute in its entirety.

Resolution Institute WA Chapter have provided below proposals to strengthen existing legislation relating to security of payment in the Western Australian construction industry. They reflect amendments proposed or supported by Resolution Institute WA Chapter during the course of the Inquiry.

More about Resolution Institute

Resolution Institute is registered by the Australian Charities and Not-for-Profits Commission (“ACNC”) as a not-for-profit organisation. Resolution Institute has a membership base of over 3,000 DR professionals, across a diverse range of industry sectors, including building and construction, finance, commercial, community, technology, mining, local government, insurance, environmental and family.

Resolution Institute members engage in adjudication, arbitration, mediation, expert determination, facilitation, conflict coaching, conciliation and restorative justice. Resolution Institute is committed to promoting and supporting the use of dispute resolution through providing education, training and accreditation or grading, to contribute to the provision of quality DR services.

Resolution Institute provides a nomination service for parties in dispute, when:

1. parties need a contractually agreed, independent and unbiased service to appoint a dispute resolver;
2. a government, industry or agency scheme requires an independent and unbiased third party to appoint an appropriately qualified dispute resolver; and
3. less commonly, an individual requests a dispute resolver.

Summary of proposed changes

1. The 'mining exemption' should be deleted.

Section 4(3) should be amended to read:

- (3) Despite subsection (2) construction work does not include any of the following work on a site in WA —
 - (a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;
 - (b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;
 - (c) *[Deleted]*
 - (d) *[Deleted]*
 - (e) work prescribed by the regulations not to be construction work for the purposes of this Act.
2. Failure to respond to a payment claim should give rise to a payment dispute. The exercise of security rights should give rise to a payment dispute.
 - (a) The definition of payment dispute should be amended to provide that a failure to respond to a payment claim within 10 business days gives rise to a payment dispute.
 - (1) For the purposes of this Act, a payment dispute arises if —
 - (aa) a payment claim is rejected or wholly or partly disputed; or
 - (ab) within 10 business days after a payment claim has been made, the recipient of a claim ("recipient") has not provided a written response:
 - (i) admitting the claim; or
 - (ii) to the extent that the recipient disputes the claim on the basis that the claim has not been made in accordance with the contract, identifying the reasons for the belief that the claim has not been made in accordance with the contract; or
 - (iii) to the extent that if the recipient believes that the whole or any part of the claim is not payable, stating in respect of each item of the claim which is disputed, the reasons for disputing it;
 - (a) by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full; or
 - (b) by the time when any money retained by a party under the contract is due to be paid under the contract, the money has not been paid in full; or

- (c) by the time when any security held by a party under the contract is due to be returned under the contract, the security has not been returned; or
 - (d) a party to the contract exercises or purports to exercise any rights in respect of money retained under the contract or under any security held by a party under the contract.
 - (2) Despite subsection (1), a payment dispute does not arise under subsection (1)¹ to the extent to which the payment claim includes matters that were the subject of an application for adjudication that has been dismissed or determined under section 31(2).
 - (3) If a payment dispute arises under both subsection (1)(aa) and (a) in relation to a payment claim then, for the purposes of this Act, the dispute arises on the earlier of the 2 occurrences.
- (b) Section 34 should be amended so that a failure to provide a response can be taken into account in awarding costs.
- (1) Subject to subsection (2), parties to a payment dispute bear their own costs in relation to an adjudication² of the dispute.
 - (2) If an appointed adjudicator is satisfied that a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs.
 - (2A) In making a decision under subsection (2), an adjudicator may take into account whether the payment dispute arose as a result of a failure to provide a response in accordance with s 6(ab) of this Act.
 - (3) If an appointed adjudicator makes a decision under subsection (2) the adjudicator must —
 - (a) decide the amount of the costs and the date on which the amount is payable; and
 - (b) give reasons for the decisions; and

¹ There does not appear to be any reason why this prohibition against duplication should be limited to only some ways in which payment disputes might arise.

² Section 44(1) should be amended to provide that the definition of costs applies to s 34. At the moment, s 44(1) defines ‘costs of the adjudication’ so that it does not include legal costs incurred by a party. Section 44(1) is expressed to apply only to s 44. There has been uncertainty whether s 34 enables an adjudicator to award legal costs. It is considered that an adjudicator should not be able to make an award of legal costs. Non-legally qualified adjudicators would not be able to assess legal costs and the threat of legal costs might be used as a threat to discourage unrepresented applicants.

- (c) communicate the decisions and the reasons in writing to the parties.
 - (4) Divisions 4 and 5, with any necessary changes, apply to a decision made under subsection (2) as if it were a determination of an appointed adjudicator.
- (c) Section 31(2)(b) should be amended to give the adjudicator power to deal effectively with disputes associated with the exercise of security rights. This change is a consequence of the amendment proposed above.
- (2) An appointed adjudicator must, within the prescribed time or any extension of it made under section 32(3)(a) —
 - (b) otherwise, determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, or to return, restore, or reinstate any security and, if so, determine —
 - (i) the amount to be paid or any interest payable on it under section 33;
 - (ia) the amount and nature of the security to be repaid, restored or reinstated³ and the amount of any compensation or interest payable as a result of the failure to return the security or as a result of the exercise or purported exercise of the security; and
 - (ii) the date on or before which the amount is to be paid, or the security is to be returned, restored or reinstated, as the case requires.

3. Section 9 should be amended so that the scope of the pay when paid prohibition is extended:

A provision in a construction contract has no effect if it:

- (a) purports to make the liability of a party (**A**) to pay money under the contract to another party contingent, whether directly or indirectly, on A being paid money by another person (whether or not a party);
- (b) purports the due date for payment of money owing by the first party (**A**) to the second party (**B**) dependent on the date on which payment

³ The expression ‘restore’ is used to describe the situation where a principal expends part of a retention fund, for example, on repair work, but is subsequently found to have done so without contractual justification. “Reinstate” is used to cover the exercise of rights under a bank guaranty. In both these cases, the security should be ‘made good’ but the contractor may not be entitled to payment of monies.

of the whole or a part of that money is made to party A by another person; or

- (c) otherwise makes the liability to pay money owing, or the due date for payment of money owing or the return of security, contingent or dependent on the operation of another contract.

- 4. A new provision should be inserted dealing with unreasonably brief notice periods. It is noted that this provision would perhaps be the most technically demanding of the proposed changes.

A party to a construction contract may not rely upon noncompliance with a provision of a contract requiring:

- (a) notice of less than 14 calendar days;
- (b) a claim being made within less than 14 calendar days

except to the extent that the person seeking to rely upon that provision has suffered prejudice as a result of the non-compliance.

- 5. A provision is required that retention is held in trust in a separate account. This provision requires developing and Resolution Institute does not offer any draft given the time available for this reply.

Conclusion

Resolution Institute would be very pleased to discuss items raised in this submission and to assist the IAG further.

Contact details:

Fiona Hollier
Chief Executive Officer
Resolution Institute
Level 2, 13-15 Bridge Street,
Sydney NSW 2000

fiona.hollier@resolution.institute